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ABSTRACT

The author argues that education should be the end and aim of politics. Further, he argues that in order for a state to be morally legitimate it must provide social and political conditions that promote and further human education and development and concludes with a practical intimation of this principle. Traditional liberal political theory arranges institutions and society in such a way that self-interested men, gathered together into opposing factions, could be prevented from harming each other. However, state authority can be made compatible with individual autonomy only if authority is exercised on behalf of securing the political conditions that enable men to take responsibility for their actions and thereby to become morally autonomous. Wherever possible, regimes based upon limiting power to prevent its being abused should be replaced with regimes grounded in the full moral and intellectual participation of individual persons in political affairs. One practical example of this principle can be applied to the jury system. Juries must be given the duty to decide upon evidence presented to it and whether the law which was broken is morally legitimate in an individual situation. In order to promote consistencies among jury verdicts, the state must provide social and political conditions whereby people of differing opinions may communicate in an attempt to overcome their differences and build greater human understanding. (Author/DE)

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POLITICS AS EDUCATION: THE FOUNDATIONS OF THE MORALLY LEGITIMATE STATE

(General Session)

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In Democracy in America, Alexis de Tocqueville noted that "In the United States, politics are the end and aim of education."[1] He was referring, of course, to the fundamental role of formal schooling in providing children and young people with the practical skills they would need in order to participate effectively in po'itical affairs as adults. In this paper, I would like to argue on behalf of the converse claim that education ought to be the end and aim of politics; indeed, that education must be the end and aim of politics if any state is to be morally legitimate.[2] I shall argue that a theory of the legitimate state must essentially be a theory of the social and political conditions promoting human development and then conclude with what I take to be at least one of the practical intimations of this principle.

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THE INCOMPATIBILITY BETWEEN POLITICAL AUTHORITY AND MORAL AUTONOMY

No state can exercise morally legitimate authority. This, in essence is the position Robert Paul Wolff argues in his book, In Defense of Anarchism. According to Wolff, the state, as it is traditionally understood in political theory, is "the human community which possesses rightful authority within a territory";[3] by rightful authority is understood "the right to command, and correlatively, the right to be obeyed."[4] But this concept of the state, Wolff goes on to argue, is "genuinely incompatible" with the inescapable moral duty of

each individual to be morally autonomous, to be under the rightful command of no one but himself.

Wolff takes as the fundamental axiom of moral philosophy the proposition that men are capable of choice and are therefore responsible for their actions. He also sees, however, that to recognize responsibility for one's actions is not yet to take responsibility for them. This involves the attempt to choose intelligently among the possible courses of action and to act on the basis of motives and reasons that justify the action chosen, that show it to be the right and proper thing to do in the circumstances. To take responsibility in this way, Wolff argues, is to be morally autonomous. He then concludes: "...if all men have a continuing moral obligation to achieve the highest degree of autonomy possible, then there would appear to be no state whose subjects have a moral obligation to obey its commands."[5] His objections to social contract theories of obligation and to the traditional solutions of democracy -- representation and majority rule -- are similarly grounded in the incompatibility between political authority and moral autonomy.[6]

Wolff quite correctly refuses to give up the commitment to autonomy. To do so, he recognizes, would be to repudiate the freedom and reason which give men their dignity and which ground the very possibility of moral and rational agency. Yet Wolff is also reluctant to leave off the search for some form of legitimate collective authority and to embrace what appears to be the only alternative to it: philosophical anarchism.

> The state [he argues] is a social institution, and therefore no more than the totality of the beliefs, expectations, habits, and interacting roles of its members and subjects. When rational men, in full knowledge of the proximate and distant consequences of their actions, determine to set

> private interest aside and pursue the general good, it must be possible for them to create a form of association which accomplishes that end without depriving some of them of their moral autonomy. The state, in contrast with nature, cannot be ineradicably other.[7]

Assuming that Wolff is right, and the political and legal institutions of the state can be reconstructed in such a way that they help bind together persons who are morally obligated to be autonomous, without at the same time threatening that autonomy, then how or according to what general principles is such a state to be ordered? To answer this question, I would like to begin with a brief, though I hope not on that account a misleading or overly simplistic, look at two quite different conceptions of the nature and purpose of political society -- in this instance democratic political society, since I take it for granted that only some form of democracy can resolve the problem of rightful, or legitimate, political authority.

LIBERAL THEORY: POLITICS AS ORGANIZATIONAL METHOD

Liberal political theorists, from Hobbes through Kant, believed that the ordinary behavior of men was controlled not by their reason, but rather by their self-regarding interests and feelings. They held that the relentless pursuit of self-interest governed human conduct and effectively shaped men's moral and political judgments. Reason was limited to serving interest; it was concerned only with the prudent calculus of pleasure and pain and the selection of efficient means to pursue nonrationally given ends.

This image of self-regarding men, each viewing others only as means to his own ends, set the problem of political organization for the liberal theorists:

how to arrange institutions in such a way that self-interested men, gathered together into opposing factions, could be prevented from harming each other. This was the problem addressed by Alexander Hamilton and James Madison in The Federalist Papers. "Why has government been instituted at all?" asked Hamilton in Federalist 15. "Because," he answered, "the passions of men will not conform to the dictates of reason and justice without constraint."[8] The consequent burden of political organization, affirmed Madison in Federalist 51, was that "of supplying, by opposite and rival interests, the defect of better motives.. .."[9] The most succinct statement of the requisite organizational principles that would remedy this "defect of better motives" is Kant's. While holding that men were essentially self-seeking and incapable of acting from duty, he also held that good organizational method could compensate for and overcome this human failing.

> But now nature comes to the aid of this revered, but practically ineffectual general will which is founded in reason. It does this by the selfish propensities themselves, so that it is only necessary to organize the state well (which is indeed within the ability of man), and to direct these forces against each other in such wise that one balances the other in its devastating effect, or even suspends it. Consequently, the result for reason is as if both selfish forces were nonexistent. Thus man, although not a morally good man, is compelled to be a good citizen. The problem of establishing a state is soluble even for a people of devils, if only they have intelligence, though this may seem harsh.[10]

In practice, what resulted was a political system characterized by specific

legal procedures for distributing power among office holders, a system of checks and balances to constrain the exercise of power, institutionalized accountability procedures for public officials, and legal guarantees enforcing and protecting the rights of citizens.[11] Given these, men could, as Kant argued, be compelled to be good citizens. As he also noted, however, this way of organizing the state does not promote the moral improvement of men. Accordingly, the separation of politics and morals became one of the defining structural characteristics of liberal democratic political arrangements.

Given the initial assumptions of liberal theorists, no other conclusion was possible. To Hobbes and his successors, individual persons were conceived to be logically and ethically prior to society, and their character as naturally self-interested was assumed to be independent of the structure of the social environment. Hence the liberals' fear of the state of nature. For them, what required explanation was not the individual but rather his membership in an organized community and the particular institutionalized forms membership took.[12] The state of civil society was seen as an escape from the state of nature. Through the social contract, men unanimously and voluntarily agreed to limit their autonomy by subjecting their discretionary actions to certain institutional constraints, not in order to better their moral character, but only in order better to protect themselves from each other.

In choosing natural man outside of society as their starting point, however, liberal theorists were led to confuse the consequences of a form of political organization with its antecedent conditions. They did not see that men's distinctive dispositions, habits, attitudes, and their characteristic ways of thought and response are largely dependent upon the purposes and goals they are encouraged or allowed to pursue within the structure of a culture. The fact of the social origin and nature of human personality means that self-

interestedness is not a characteristic of a person independent of the political and social environment in which self-interestedness is displayed. Man's self-interestedness, if this is in fact his definitive characteristic, is not therefore an antecedent given of human nature. It is an acquired disposition, the result of his accomodations to and attempts to adjust existing social and political environments. Accordingly, both the individual and his membership in an organized community require explanation -- and the explanation of each can be given only in terms of the other.

The superb irony of liberal theory is that liberal democratic political arrangements, grounded in the assumption of the natural self-interestedness of men and their inability either to be governed by reason or to act from duty, legitimate and perpetuate the very behavior those arrangements are designed to protect against. The practical consequences of liberal theory have been held, mistakenly, to validate its initial assumptions. They do not, however, validate those assumptions so much as they fulfill them.

CLASSICAL THEORY: POLITICS AS EDUCATION

While liberal democratic theorists were content with political arrangements that compelled men to be good citizens, such classical democratic theorists as Thomas Jefferson, John Stuart Mill, T. H. Green, and John Dewey[13] held that the standard against which these arrangements were to be assessed was whether they encouraged and promoted the development not just of good citizens but of morally good men. In Mill's words,

> ...the most important form of excellence which any form of government can possess is to promote the virtue and intelligence of the people themselves. The first question in respect to any political institutions is how far they tend

> to foster in the members of the community the various desirable qualities, ...moral, intellectual, and active.[14]

Rather than emphasizing an elaborate maze of checks and balances and otherwise concentrating on mitigating the effects of the discretionary actions of the citizenry, these theorists suggested a quite different remedy. "I know of no safe depository of the ultimate powers of the society," observed Thomas Jefferson, "but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion with education."[15] For Jefferson, Mill, and the others, the education of the public took two distinct but equally important forms: the extension of public schooling, and more important for our purposes here, the full moral and intellectual participation of the public in social and political affairs.[16] With regard to the latter, the point and purpose of democratic politics was to create the conditions for such moral and intellectual participation as a means to a yet further end: the continued moral and intellectual growth of persons.

Important differences in perspective are introduced when political arrangements are valued for their distinctively educative effects rather than for their effects in regulating and controlling the self-interested actions of individuals and groups. Democracy, itself, for example, comes to be perceived not merely as a form of government characterized by checks and balances and majority rule, but rather as a form of life; in Dewey's words, "a mode of associated living, of conjoint communicated experience" in which each person is encouraged "to refer his actions to that of others, and to consider the actions of others to give point and direction to his own."[17]

Free speech, press, and assembly become more than simply constitutionally protected means by which self-interested individuals bring legitimate pressure

to bear on the political process. They become rather the means by which individuals can communicate with each other and expand the range of their social experiences, these being the necessary conditions for developing both an enhanced sensitivity and responsiveness to the legitimate demands of others and a broader moral and intellectual perspective on public issues generally.

Perhaps most important, however, is the different perspective on moral obligation. Within the liberal framework, one's moral obligations are essentially obligations to refrain from selfish actions that would directly cause harm to another. On these grounds, political apathy is not only tolerable, it is frequently celebrated.[18] Within the classical framework, however, one's moral obligations go considerably beyond that of simply not doing another harm. For the conditions of human growth are such that the growth of any one person is both cause and consequence of the growth of other persons. For all but a very few individuals, mental and moral growth requires the concerned, competent presence of others, particularly others whose backgrounds and perspectives are different, to challenge traditional ideas, introduce new considerations, and provoke thought to go beyond the conventional wisdom. This kind of close communication between persons is what makes it possible for men to reach levels of intellectual development that enable them to reason more intelligently about their choices and thereby to take increasingly greater moral responsibility for their actions.

Moral and intellectual autonomy, in other words, are human achievements. And if each of us is to achieve the highest degree of autonomy possible, then we must acknowledge a moral obligation and duty to participate with others in social and political affairs. It is only through such participation that we can contribute effectively to the moral and intellectual development of others and thereby preserve and enhance the conditions for our own continued growth.

Here political apathy is morally intolerable.

We have now come full circle back to Wolff, but I hope with a more clear understanding of the social conditions necessary for the satisfactory discharge of our moral duty to be autonomous. If the above argument is correct, then the duty of autonomy and the exercise of state authority can in fact be made compatible, contrary to Wolff, so long as the authority of the state is exercised on behalf, and only on behalf, of securing the political conditions that enable men to take responsibility for their actions and thereby to become morally autonomous.[19] As a practical example of the rightful role of political arrangements given this framework of the legitimate state, and in order to make the argument more concrete, I would like to turn to a consideration of the proper role of the jury in criminal trials.

THE ROLE OF THE JURY IN JUDGING THE CRIMINAL LAW

I take it as given that political systems as we currently know them are not yet about to wither away and be replaced by intentional moral communities held together by shared commitments to personal growth. Nor do I here wish to advocate such a state of affairs. My purposes are rather more limited. What I am proposing is what might be called a regime change: an alteration of the basic principles or norms by which existing political systems operate. In particular, I am proposing that wherever practicable we replace a regime based exclusively upon limiting power to prevent its being abused with a regime grounded in the full moral and intellectual participation of individual persons in political affairs. This latter principle should become the ideal toward which we strive in ordering our political arrangements. In what follows, I would like to explore the effects of using this ideal to alter one significant component of the political system, the jury

trial.

The institution of the jury trial is of particular importance in working democracies. One of the chief provisions of Magna Charta, in 1215, guaranteed barons the right to a trial by their peers in cases of disputes with their sovereigns. In the United States, this right was later secured in the Bill of Rights appended to the Constitution. Its primary function -- and ultimate importance -- is that it stands between the individual and the state, demanding that the state show good and sufficient reasons before subjecting any citizen to its punishing power.

Depending upon which normative conception of democracy is held, however, the particular responsibilities of the jury in criminal trials will be differently understood, with liberal theory suggesting a far more limited and constrained role than classical theory. Usual practice in the United States is grounded in the liberal theory. The division of courtroom responsibilities is such that interpretation of the law is held to be exclusively the right and duty of the court, while judgments of fact and evidence are exclusively the right and duty of the jury. The court's standard instruction to the jury distinguishes these roles clearly.

> Members of the Jury:
>
> It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the fact as you find them from the evidence in the case.
>
> ...Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any

other view of the law than that given in the instructions of the Court.[20]

The liberal dogma that "the passions of men will not conform to the dictates of reason and justice without constraint" is embodied in trial procedures in the form of well established limits on the discretionary actions of judge and jury. The role of the trial judge is rigidly circumscribed through the power of appellate review to the application of fixed rules of law and to the enforcement of established canons of substantive and procedural due process. The role of the jury was limited to the determination of matters of fact, at least at first, by threatening jurors with fines or imprisonment if they reached a verdict judged by the court to be contrary to the weight of the evidence presented during the trial. Although such bills of attaint were abolished in the seventeenth century in English common law, the limited role of the jury remained, sanctioned by precedent, tradition, and the commonly accepted belief in the intellectual inability of the average citizen to separate good laws from bad.

Contemporary trial procedures depart, however, in several ways from the general rule that the jury's duty is limited to passing on matters of fact and evidence only. For example, the constitutions of nineteen states reserve exclusively to juries the right to judge of fact and law in trials for criminal libel. The judge's legal instructions to the jury are advisory only, and the jury has no obligation to follow them. In addition, the Indiana, Illinois, and Maryland state constitutions recognize juries to be the sole judge of fact and law in all criminal trials. It is the jury that is authorized to determine what the law is and whether and how it applies to the evidence and facts of the case.[21]

Even where the jury is not recognized to have the right to judge the law,

there are no effective means of preventing jurors from making, if they so desire, their own independent determination of the worth and applicability of the law. Jurors cannot be fined and imprisoned for acquitting contrary to the weight of the evidence or for ignoring the instructions of the court; they need not make public the reasons for their verdicts; and since there is no way for the court to know either on what evidence the jury based its decision or how the jury distinguished between fact and law in their deliberations, the court is powerless to set aside the jury's verdict. Jurors in criminal trials consequently enjoy a degree of freedom from checks on their discretionary action that is quite at odds with the working assumptions of liberal theory, in particular with the assumption that the ordinary citizen, governed by his passions, is incapable of passing fair and informed judgments on the law. This anomalous situation is further compounded by the fact that trial procedures, as one might expect from the theory, are frequently characterized by the impassioned advocacy of lawyers who are less concerned with determining the truth than with furthering their own interests by securing a favorable verdict for their client. While lawyers are constrained somewhat by settled, standing rules of due process enforced by the court, there are no comparable constraints on jurors' actions. As citizens, their passions control them; as jurors, their passions are frequently appealed to; and in the absence of effective constraints, their verdicts cannot therefore serve the interests of reason and justice.

The remedies proposed by liberal theory would seem to be either of the following. The jury could be required to make public the reasons for its verdicts, reasons open to the scrutiny and review of the court. If the court should find the reasons to be unacceptable, then it could contest the jury's verdict and either order the jury to deliberate further or order a new jury impaneled. Or, instead of allowing the jury to weigh the evidence, determine

the facts, and apply the law to the facts, the court could simply ask the jury for its finding of fact, together with its relation to the evidence presented during the trial. The court could then declare a verdict based upon its determination, subject to appelate review, of the applicability of the relevant law.

Each of these remedies must be rejected, however, for each constitutes a morally illegitimate extension of state authority. If jurors in a criminal trial relinquish to the trial judge final authority to determine what constitutes good and sufficient reasons for a particular verdict, or final authority to apply the law and decide the case, then they have forfeited their autonomy to public officials over whose actions they have at best only distant and indirect control. Appeals to majority rule and to the rule of law to justify these forfeitures, or any others, serve only to mask the status of jurors as obedient and docile servants of an illegitimate state.

The moral autonomy of the individual citizen, in his role as juror, can be maintained only to the extent that the jury reserves to itself final authority to judge fact and law. Indeed, the giving of reasons implicit in the utterances and deliberations of legislative, executive, and judicial bodies, and in the laws themselves (to the extent that they are reasons at all and not quasi-papal pronouncements on matters of faith and morals), invites examination by the jury and the rejection of laws found wanting. The only morally legitimate role of the state in trial procedures is therefore that of insuring that jurors are enabled to exercise their discretionary authority intelligently and wisely.

If jurors are to do this, however, trial practices in this country need to be reconstructed in significant ways. To begin with, consider the role of the jurors as sole judges of the facts. Even though they must reach a final

verdict based upon their determination of the facts, jurors are denied any form of direct participation in the trial itself. They are not allowed to question witnesses or to subpoena witnesses of their own, regardless of the questions they may have that, for self-interested reasons, are left unanswered or unasked by prosecution and defense attorneys. Jurors are also forbidden to take notes during the course of the trial, regardless of its length or complexity. Nor is a copy of the trial transcript placed in the jury room for their convenient use. If, in their deliberations, jurors desire access to the transcript, they can only request the court stenographer to read aloud the relevant parts of the tape. As Andrew Hacker concludes, these kinds of court procedures "do little to encourage sound verdicts. Justice does get done, but as often by accident as by design."[22]

In their role as judges of the laws, even more far reaching changes in court procedures are suggested. Ordinary citizens have little opportunity, perhaps little inclination, to reflect at length and in detail on the point and purpose of the laws and of political arrangements generally. Lawyers must therefore undertake to educate jurors about the law. They must become concerned not with securing a <u>favorable</u> verdict, but with helping jurors to reach a <u>trustworthy</u> verdict, whatever it might be -- a verdict grounded in evidence and reason and in a broad, critical understanding, so far as it is within the ability of judges and lawyers to do this, of the merits and defects of the law as it is applied in the case before them. This means that courts must admit, as currently they do not, arguments relating to the possible justification for violating the law. Advocacy must be made to yield to impartial inquiry, from which the law itself is not immune. And such practices as the coaching of witnesses and the use of dramatic oratory to appeal to the passions rather than to the reason of jurors must be proscribed and the proscriptions enforced by

the legal profession and in particular by trial judges.

One aspect of jury trials should, however, remain unchanged, and that is the requirement that verdicts be unanimous.[23] Twelve jurors, selected an agreed upon jointly by prosecution and defense attorneys, must agree, after an extensive process of courtroom argument, judicial instruction, and jury room deliberation and debate, on the adequacy of the evidence and the merit and applicability of the law. The test of unanimity in these circumstances, while not guaranteeing that the resulting verdict will be correct (but what could guarantee this?), at least enhances that possibility.

With trial procedures defined and understood in this way, individual citizens, in their role as jurors, are afforded by the state an opportunity to develop a broader, more comprehensive understanding of the point and purpose of the law. Indeed, the contribution and great potential of jury service in this way "to form the judgment and to increase the natural intelligence of a people" struck Tocqueville as perhaps its greatest advantage.

> It may be regarded [he went on] as a gratuitous public school, ever open, in which every juror learns his rights, enters into communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. I think that the practical intelligence and political good sense of Americans are mainly attributable to the long use they have made of the jury in civil causes. ... I look upon it as one of the most efficacious means for the education of a people which society can employ.[24]

Of even greater significance, however, is that jury service can provide citizens with a legally recognized procedure for retaining final say over whether they will cooperate with or oppose the state. So long as jurors insist upon final authority to decide questions of both evidence and law, they retain and reaffirm their moral autonomy. The exercise of state authority to mandate trial procedures that respect the rights of jurors to pass judgment on the laws would seem, then, in all respects to be consonant with the moral duty of persons to be autonomous.

All of this is not, however, purchased without a price. If a jury has the right to decide the law, it then also has the right to decide what law applies where. Juries in rural Georgia and in San Francisco, for example, may decide quite differently what constitutes pornography or whether essentially similar acts of civil disobedience or euthanasia deserve legal punishment. Stare decisis, the rule of precedent, is no longer compelling. Whatever the moral desirability of the situation, the political consequences could be chaotic.[25]

The state could respond in either of two ways, it seems. It could, of course, turn despotic and bypass the jury in rigidly enforcing what it decides to be the law. In doing so, it would give up all claim to moral legitimacy. Or, it could redouble its efforts to establish the conditions whereby people of different persuasions on issues, widely dispersed, are enabled to communicate with each other in an attempt to overcome their differences and build the foundations for broader human understanding. If the state is to be morally legitimate, it is necessarily limited to the latter effort.

A final consideration. What if jurors exercise their autonomy at the price of the defendant's in, say, a pornography case or in the case of burning a draft card or releasing classified materials to the public? Juries, after all, convict as well as acquit.[26] Yet, if it is the case that all citizens,

not just jurors, have a moral right and duty to be autonomous, then jurors have an obligation to see to it that the state, through the laws, does not encroach upon the autonomy of its citizens, either directly, as in the laws against pornography, or indirectly, as in laws prohibiting public access to materials bearing upon the origins and reasons for our involvement in a costly and controversial war. How this principle applies to individual cases is often open to discussion. But that every law of the state must be assessed against it, and that the moral legitimacy of the jury itself depends ultimately upon how effectively it can protect individual autonomy from incursions by the state, seems incontestable.

REFERENCES AND FOOTNOTES

1. Alexis de Tocqueville, Democracy in America (New York: Alfred A. Knopf, 1963), Vol. I, p. 318.
2. I realize, of course, that a state, to be legitimate, must have other aims as well, e.g., distributive justice. I am not sure, however, that these other aims could not be subsumed under a broad understanding of education. In any event, that is a topic for a different paper.
3. Robert Paul Wolff, In Defense of Anarchism (New York: Harper and Row, 1970), p. 11.
4. Ibid., p. 4.
5. Ibid., p. 19.
6. Wolff does recognize, however, that the duty to be autonomous and the commands of authority are "harmonized" in a unanimous direct democracy. However, this form of political association, he contends, "is so restricted in its application that it offers no serious hope of ever being embodied in an actual state." Accordingly, "it may be viewed as the limiting case of a solution rather than as itself a true example of a legitimate state." Wolff, op. cit., p. 69.
7. Ibid., p. 78.
8. Clinton Rossiter (ed.), The Federalist Papers (New York: New American Library, 1961), p. 110.
9. Ibid., p. 322.
10. Immanuel Kant, "Eternal Peace" in C. J. Friedrich (ed.), The Philosophy of Kant (New York: Random House, 1949), pp. 452-453. Quoted in Sheldon Wolin, Politics and Vision (Boston: Little, Brown and Co., 1960), p. 389. For further elaboration on the idea that correct organizational method can compensate for human failings, see Wolin, pp. 376-393.

11. Wolin, op. cit., p. 388.

12. George H. Sabine, A History of Political Theory (New York: Holt, Rinehart and Winston, 1961), third edition, p. 433.

13. See John Stuart Mill, Considerations on Representative Government (London: Longmans, Green, Reader, and Dyer, 1884); T. H. Green, "Liberal Legislation and the Freedom of Contract," in R. L. Nettleship (ed.), The Works of T. H. Green (London: Longmans, Green, and Company, 1891), Vol. III, pp. 365-386; Gordon C. Lee (ed.), Crusade Against Ignorance: Thomas Jefferson on Education (New York: Teachers College Press, 1961); and John Dewey, Democracy and Education (New York: The Macmillan Company and The Free Press, 1966).

14. Mill, op. cit., p. 12.

15. Lee, op. cit., p. 17.

16. As Tocqueville put it, op. cit., p. 251:

> It is incontestable that the people frequently conduct public business very badly; but it is impossible that the lower orders should take part in public business without extending the circle of their ideas and quitting the ordinary routine of their thoughts.

Also, see Mill, op. cit., p. 27, where he cites approvingly "the public education which every citizen of Athens obtained from her democratic institutions," particularly "the moral part of the instruction afforded by the participation of the private citizen, if even rarely, in public functions"; and Lee, op. cit., p. 17, where Jefferson refers to the freedom of the press as the pre-eminent means "for enlightening the mind of man and improving him as a rational, moral, and social being."

17. Dewey, op. cit., p. 87.

18. On this point, see Jack Walker, "A Critique of the Elitist Theory of Democracy," American Political Science Review, LX (June 1966), p. 291.

19. Since writing this paper, I have come across Jeffrey Reiman's reply to Wolff, entitled In Defense of Political Philosophy (New York: Harper and Row, 1972). Reiman's arguments, as I understand them, are essentially similar to mine. Each of us is arguing, in effect, that morally legitimate political obligations are based upon a feature intrinsic to the theory of the political system itself. It should be clear, however, that while political obligations can be assessed in terms of their moral legitimacy, there is no conceptual (i.e., logical) connection between political obligations and moral obligations. Michael Stocker has shown convincingly that while certain moral duties may presuppose the existence of certain legal and political institutions, these institutions are not the ground of moral duties; further, that while certain institutional duties may be moral duties as well, they are moral duties only because of their non-institutional relation to noninstitutional moral duties. Institutional duties, in other words, can at best be only specifications of noninstitutional moral duties. (Michael Stocker, "Moral Duties, Institutions, and Natural Facts," The Monist, Vol. 54, No. 4 [October 1970], pp. 602-624.)

20. Edward J. Devitt and Charles B. Blackman, Federal Jury Practice and Instructions -- Civil and Criminal, second edition (St. Paul, Minn.: West Publishing Co., 1970), Vol. II, Section 70.01, "Province of the Court."

21. Samuel McCart, Trial by Jury, second edition (New York: Chilton Books, 1965), pp. 117-118.

22. Andrew Hacker, "Who Killed Harry Gleason?", The Atlantic, Vol. 234, No. 6

(December 1974), p. 52.

23. Unanimity is required in all federal criminal cases on all issues that are left to the discretion of the jury, including the character and degree of the crime, guilt, and punishment. See Andres v. United States, 333 U. S. at 748 (1948). In state criminal proceedings, only Louisiana and Oregon admit less than unanimous verdicts.

24. Tocqueville, op. cit., pp. 282-283, 285.

25. On this point, I am indebted to my colleague, Lawrence Peterman.

26. In this regard, there is still perhaps a role for stare decisis, for it would seem to be a violation of reason to convict under a law for which there is no precedent. One of the functions of the court, then, at both the trial and appellate levels, would be to protect the rights of defendents, regardless of their moral terpitude, from the overzealous actions of jurors in pursuing criminal convictions for which there is no legal precedent.